

In this case a police officer conducted an enquiry into a non-seizable case without the order of the Public Prosecutor under section 108(ii) of the Criminal Procedure Code (Cap. 6). In the course of that enquiry the appellant made a certain statement which the police officer purported to record under section 112(i) of the Code. The case into which the police officer was making enquiries subsequently came to trial. The appellant was a witness at the trial and gave evidence completely at variance with his statement to the police officer: subsequently the appellant was charged under section 193 of the Penal Code it being alleged that he had made contradictory statements in a judicial proceeding.

Held: since the police officer recorded the appellant's statement before the order of the Public Prosecutor had been obtained under section 108(ii) of the Criminal Procedure Code, the special powers in relation to police investigations under Chapter XIII of the Code had not arisen and as a result the appellant was not bound to answer truly all questions put to him by the police officer purportedly under section 112 of the Code. As a result the statement made to the police officer was not made in the course of a judicial proceeding.

MAGISTRATE'S CRIMINAL APPEAL.

K. Chelvanayagam for the appellant.

H. S. Ong (Federal Counsel) for the respondent.

Smith J. : — In this case the prosecution conceded that the investigation began before the order of the Public Prosecutor to investigate was given. Consequently, there was no obligation for any person interviewed by the Police before such order was given to tell the truth when giving his statement (see sections 108(ii) and 112(iii) of the Criminal Procedure Code). The prosecution of the accused should never have been commenced, and although the accused has pleaded guilty, acting in revision I reversed the finding and sentence and acquitted the accused/appellant.

Order accordingly.

CHEW KEAN KOR v. BEH SENG SIEW

[O. C. J. (Syed Sheh Barakbah J.) June 26, 1958]

[Ipoh — Civil Suit No. 234 of 1956]

Bankruptcy — Vesting of bankrupt's property in Official Assignee — Whether Official Assignee is trustee or agent for bankrupt — Right of a discharged bankrupt to interfere with the administration in bankruptcy — Discretion of Official Assignee to admit proof of debt — Nature of a bankrupt's right to surplus — Right of discharged bankrupt to vary or rescind admission of proof of debt or to obtain refund of dividend paid to creditor in bankruptcy if admission of proof improperly or fraudulently obtained — Equitable right of discharged bankrupt against creditor in bankruptcy.

In this action the plaintiff, a discharged bankrupt, claimed from the defendant \$16,929-68 being, he alleged, the amount unlawfully received by the defendant from the Assistant Official Assignee, Penang, together with interest from date of judgment to date of satisfaction and costs. Counsel for the defendant submitted that the plaintiff had no right of action to set aside an admission of proof of debt to a creditor in bankruptcy by the Official Assignee, or obtain a refund of dividend wrongly

A paid by the Official Assignee to such creditor in bankruptcy. In reply, counsel for the plaintiff stated that the plaintiff was suing the defendant creditor for obtaining the amount by fraudulent means and that there was no authority to show that a discharged bankrupt could not sue a fraudulent creditor in Court.

B Held: (1) the property of a bankrupt became the property of the creditors and the Official Assignee was the trustee for the creditors. Thereafter, only the trustee could deal with the property and only he could effectively complain against the creditors;

(2) the bankrupt could not go behind the trustee;

(3) a discharged bankrupt has no *locus standi* and has no right of action to set aside an admission of proof of debt to a creditor in bankruptcy by the Official Assignee or obtain a refund of dividend wrongly paid by the Official Assignee to such creditor in bankruptcy;

C (4) the proper course for the plaintiff would be to adopt the procedure as provided by section 79 of the Bankruptcy Enactment (Cap. 55);

(5) in this case the plaintiff disclosed no cause of action against the defendant.

Cases referred to:—

(1) *Jarrett v. Barclays Bank Ltd.* (1947) 1 Ch. 54.

(2) *In re Debtor* (1949) 1 Ch. 236.

(3) *Ex parte Harper, In re Tait* (1882) 21 Ch. D. 537.

(4) *Lewis v. Leonard* (1880) 5 Ex. D. 165.

(5) *In re Leadbitter* (1878-9) 10 Ch. D. 388.

(6) *Harper v. Greensill* (1873) 42 L.J.C.P. 55.

(7) *Barter v. Dubeux & Co.* (1880-1) 7 Q.B.D. 413.

(8) *Ex parte Sheffield, In re Austin* (1878-9) 10 Ch. D. 434.

(9) *In re Harris* (1899) 2 Q.B. 97.

CIVIL SUIT.

On February 15, 1952 the plaintiff, who was in need of funds, obtained from the defendant, a sum of \$8,000 in exchange for a post-dated cheque for the same amount payable on March 15, 1952. On the representation of the plaintiff that he would be unable to meet the cheque, it was never presented to the Bank. In 1953, defendant brought an action for recovery of \$8,000 due on the said cheque. The plaintiff in his defence, alleged that relying on the representation of the defendant that the cheque was out of date he gave the defendant a further cheque for \$8,000 some time later in settlement and that again in June 1952, at the insistence of the defendant, he paid him \$8,000 in cash in full settlement but the plaintiff did not return either of the two cheques. The defendant denied these allegations. The plaintiff further alleged that he gave a cheque for \$500 to the defendant by way of interest. The defendant, however, alleged that the cheque for \$500 was given in exchange for cash.

During the pendency of the action, the plaintiff was adjudicated a bankrupt in 1954. The defendant

lodged his proof in bankruptcy and disclosed to the Official Assignee the pending action. The plaintiff alleged that the holder of the other cheque for \$8,000 a nominee of the defendant also lodged his proof in bankruptcy. The plaintiff objected to the Official Assignee against the admission of these and other debts. After investigation, the Official Assignee, in the exercise of his discretion, admitted proof of these debts and both the defendant and the holder of the other cheque were paid in full. Subsequently in 1956 the plaintiff was discharged from bankruptcy. After his discharge, the plaintiff brought this action claiming a sum of over \$16,000 from the defendant alleging that the Official Assignee was a trustee and agent for him and he was entitled to a refund from the defendant of these sums which were improperly and fraudulently obtained by him or on his behalf.

M. Abraham for the plaintiff.

S. K. Das (*J. S. Chabra* with him) for the defendant—plaint discloses no reasonable cause of action: R.S.C., O. 25, r. 3. Law is settled. The property of a bankrupt which vests in the Official Assignee is not his property. It is the property of his creditors. The money paid out was once his property, but has ceased to be the bankrupt's. The plaintiff, at the time of payment, had no present interest in it, nor in any particle of it and has none now.

The Official Assignee was never the plaintiff's trustee or agent. *In re Leadbitter*⁽⁵⁾, *Jarrett v. Barclay's Bank Ltd. & Nash*⁽¹¹⁾.

The surplus payable to him by the Official Assignee is not even a debt. *Harper v. Greensill*⁽⁶⁾; *Ex parte Sheffield, In re Austin*⁽⁸⁾.

An order annulling or discharging a receiving and adjudication order is conclusive evidence of the validity of liquidation proceedings—Section 98(ii). *Lewis v. Leonard*⁽⁴⁾.

Only the Official Assignee and possibly the creditors could have applied to the Bankruptcy Court under section 79 to rescind or vary the admission of proof if it was wrongly admitted. But the creditor is in any event entitled to retain such sums as have already been paid to him. Here 100 per cent paid. The bankrupt cannot interfere with the administration in bankruptcy. *Ex parte Harper, In re Tait*⁽³⁾, *In re Debtor*⁽²⁾.

It is only in a case of composition or scheme which is rejected by the creditors that the debtor may apply.

If in the exercise of his judgment the Official Assignee admits proof of debt the bankrupt has no right whatever to question its propriety and the

bankrupt has no *locus standi* either during his bankruptcy or after his discharge to question the propriety of the Official Assignee's decision. *In re Debtor*⁽²⁾ at p. 244.

Defendant was justified in not proceeding with his earlier action, for his only remedy was to prove his debt in bankruptcy. *Barter & Co. v. Dubeux & Co.*⁽⁷⁾

No allegation against the Official Assignee that he has been guilty of "suppression or concealment by him of a fraudulent kind" and no application under section 75(iii) to set aside his release. *In re Harris*⁽⁹⁾, *In re Debtor*⁽²⁾ p. 240.

M. Abraham for the plaintiff—No allegation of improper conduct is made against the Official Assignee. He acted *bona fide* but was misled by defendant. He is trustee or agent for the bankrupt of all his property. The claim by the plaintiff rests on equitable principles that a person obtaining money from his trustee or agent by fraudulent means is liable to refund the amount to the *cestui que* trust or principal. No authority shown that in such circumstances a discharged bankrupt's action has failed. The cases quoted only show that an undischarged or discharged bankrupt's action against his trustee in bankruptcy is not maintainable, unless he is guilty of fraud.

Cur. Adv. Vult.

Syed Sheh Barakbah J.:—This is an action by the plaintiff against the defendant claiming \$16,929.68 being, he alleges, the amount unlawfully received by the defendant from the Assistant Official Assignee, Penang, together with interest from date of judgment to date of satisfaction and costs.

When the case came on for hearing before me on the 17th June, 1958, Mr. Abraham for the plaintiff made an application for postponement, which was strongly opposed by Mr. Das, counsel for the defendant, on the ground that the case had been pending for a long time and that the defendant is an old man of 70 years of age and could now hardly walk.

Upon the Court refusing to grant the application for postponement and ordering the trial to proceed, Mr. Das raised the preliminary objection that the plaintiff disclosed no cause of action. He submitted that being a discharged bankrupt (vide paragraphs 7 and 8 of the plaint) the plaintiff had no right of action to set aside an admission of proof of debt to a creditor in bankruptcy by the Official Assignee, or obtain a refund of dividend wrongly paid by the Official Assignee to such creditor in bankruptcy. He stated that on bankruptcy the property of the bankrupt vested in the Official Assignee as trustee for the creditors and that a discharged bankrupt had no *locus standi*. In

support of his submission he quoted the cases of *Jarrett v. Barclays Bank Ltd.*⁽¹⁾, at page 63, *In re Debtor*⁽²⁾, at page 239, *Ex parte Harper*⁽³⁾, *Lewis v. Leonard*⁽⁴⁾, *In re Leadbitter*⁽⁵⁾, *Harper v. Greensill*⁽⁶⁾, and *Barter & Co. v. Dubeux & Co.*⁽⁷⁾, at page 416, and produced by consent a bundle of agreed documents, Ex. D.1, relevant letters being on pages 3, 4, 5, 8, 9, 11, 12, 13, 14, 17, 18 and 20.

In reply the learned counsel for the plaintiff stated that the plaintiff was suing the defendant creditor for obtaining the amount by fraudulent means and that there was no authority to show that a discharged bankrupt could not sue a fraudulent creditor in Court.

With the view submitted by the learned counsel for the defendant I am inclined to agree. From the authorities quoted above, it is clear that the property of a bankrupt became the property of the creditors and the Official Assignee was the trustee for the creditors. Thereafter, only the trustee could deal with the property and only he could effectively complain against the creditors. The bankrupt could 'not go behind the trustee', and I agree with Mr. Das that the plaintiff, a discharged bankrupt, has no *locus standi* and has no right of action to set aside an admission of proof of debt to a creditor in bankruptcy by the Official Assignee or obtain a refund of dividend wrongly paid by the Official Assignee to such creditor in bankruptcy.

In my opinion, the proper course, if any, would be for the plaintiff to adopt the procedure as provided by section 79 of the Bankruptcy Enactment (Cap. 55).

For the reasons stated above, in my view, the plaint discloses no cause of action against the defendant and the suit should be dismissed with costs.

Suit dismissed.

Solicitors: *M. Abraham; Chabra & Dharmananda.*

PUBLIC PROSECUTOR v. CHIEF EXECUTIVE SECRETARY, M.C.A.

[A. Cr. J. (Smith J.) November 7, 1957]

[K. L. — Criminal Appeal No. 35 of 1957]

Road Traffic — Carriage of goods without permit — Station wagon used therefor on public road — Vehicles used for private purposes — Motor Vehicles Commercial Use Regulations, reg. 7(ii).

Interpretation — Short title as aid to construction.

In this case the motor vehicle in question was a station wagon belonging to the Malayan Chinese Association. One day the vehicle driven by a servant of the Association was carrying a mixed load of chairs and

tables and table covers. There was no dispute that the articles in the van were being carried for the use of the Association and that they were not to be used for any commercial purpose. The respondent was charged for contravening reg. 7(ii) of the Motor Vehicles Commercial Use Regulations and the learned Magistrate acquitted him without calling his defence.

On appeal by the Public Prosecutor.

Held: (1) the intention of the Motor Vehicles Commercial Use Regulations is to control the use of motor vehicles when used commercially;

(2) in this case the motor vehicle was not used commercially and therefore the learned Magistrate was right in acquitting the respondent.

Case referred to:—

(1) *Khoo Teck Yam v. Public Prosecutor* (1955) M.L.J. 113.

MAGISTRATE'S CRIMINAL APPEAL.

Mohd. Salleh bin Abas (Federal Counsel) for the appellant.

J. A. B. Lang for the respondent.

Smith J.: — The defendant was charged before the Magistrate's Court, Kuala Lumpur on the following charge and acquitted without his defence being called:—

"That you on 14.9.56 at about 6.30 p.m. at Ipoh Road, Kuala Lumpur, being the owner of Motor Van No. BC 3401 did use the said vehicle on the public road for the carriage of goods without a permit, and that you have thereby committed an offence under Regulation 7(ii) of the Motor Vehicles Commercial Use Regulations and punishable under the same Regulations."

The facts are simple and not in dispute. The motor vehicle in question is a station wagon belonging to the Malayan Chinese Association and is registered in the name of the Chief Executive Secretary of the Association. One day the station wagon driven by a servant of the defendant was carrying a mixed load of 150 chairs and tables and 40 table covers. There is no dispute that the articles in the van were being carried for the use of the Association and that they were not to be used for any commercial purpose. The Regulation under which the defendant was charged is Regulation 7(ii) which reads as follows:—

"Any person who uses or causes or permits to be used or who abets the use of a motor vehicle for the conveyance of passengers for hire or reward or for the carriage of goods without a permit or licence or otherwise in contravention of these Regulations shall be guilty of an offence and shall on conviction be liable to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding one year or to both such fine and imprisonment."

The argument for the prosecution was that the Regulation prohibits the carriage of goods whether the goods are carried for private purposes or for commercial purposes, and the sole point which has to be decided is whether or not the chairs, etc. are goods.

"Goods" are defined in the Regulations as follows:—

"Goods or burden of any description but does not include passengers' luggage carried on a passenger vehicle in which the passenger is travelling".